Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD MARK HENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. FORD
Counsel of Record
THE FORD LAW FIRM
1220 16th Street South
Birmingham, Alabama 35205
(205) 933-2070

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sentencing Reform Act of 1984 violates the Fifth Amendment Due Process Clause of the Constitution?

2. Whether the Sentencing Reform Act of 1984 violates Article III of the United States Constitution and the separation of powers doctrine?

3. Whether the District Court and the Court of Appeals incorrectly applied *United States v. Garcia*, 890 F.2d 355 (11th Cir. 1989) as controlling authority and failed to apply *United States v. Tovar-Rico*, 61 F.3d 1529 (11th Cir. 1995) in light of the District Court's finding that it was unable to determine whether (Ms. Henson) understood and appreciated what was read to her and what she signed?

PARTIES TO THE PROCEEDING

1. Donald Mark Henson
2. United States of America

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CITATIONS OF REPORTS OF OPINIONS

1. *United States of America v. Donald Mark Henson*, No. 99-12607-EE. In the United States Court of Appeals for the Eleventh Circuit (Non-published affirmance and denial of petition for rehearing at App. 21).

STATEMENT OF JURISDICTION

Jurisdiction, pursuant to 28 U.S.C. § 1257, is premised on the fact that the petitioner, Donald Mark Henson, was convicted and incarcerated in violation of his fourth and fifth amendment rights and his punishment was too harsh because of federal sentencing guidelines which are unconstitutional and because the Eleventh Circuit Court of Appeals denied his appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

   U.S. Const. amend. V.

2. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. Const. amend IV.

3. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuances in office.

   U.S. Const. Art. III, § I.

4. There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or

his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [18 USCS § 3553(a)(2)];

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [18 USCS § 3552(a)(2)].

(Oct. 12, 1984, P.L. 98-473, Title II, Ch. II, § 217(a), 98 Stat. 2017; Apr. 15, 1985, P.L. 99-22, § 1(1), 99 Stat. 46.)

5. It shall be unlawful for any person . . . who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport any firearm or ammunition in interstate or foreign commerce.

(Added June 19, 1968, P.L. 90-351, Title IV, § 902, 82 Stat. 228; Oct. 22, 1968, P.L. 90-618, Title I, § 102, 82 Stat. 1216.)

STATEMENT OF THE CASE

FACTS

On April 19, 1999 Donald Mark Henson was found guilty of being a convicted felon in possession of weapons in violation of 18 U.S.C. § 922(g)(1). App. 7.

On April 14, 1999 District Judge Robert B. Propst entered findings of fact and conclusions of law based on evidence presented at a hearing on the Defendant's Motion to Suppress the Evidence. The Court found as follows: "The Court is unable to determine whether she understood and appreciated what was read to her and what she signed." This finding alone is tantamount to a finding that the consent was non-voluntary and made without the understanding that one could refuse to sign the officers' consent form. App. 3.

Nevertheless, the Court denied appellant's Motion to Suppress and admitted the tainted guns (the only fruits of the search) into evidence. App. 6.

On April 19, 1999 the Defendant was found guilty under Count II of the amended indictment and on July 21, 1999 the trial judge made the statement that the 63 month sentence imposed by the application of the sentencing guidelines were "way out of line" (R9-8). The Defendant was not given an opportunity to show how he had changed his life since the predicate offense.

The sentencing hearing was held on July 21, 1999 (R9), and the Presentence Report and Sentencing Recommendations were filed under seal on July 23, 1999. (R1-51, R1-52). Judgment and Commitment as to the Defendant was entered on July 23, 1999. (R1-53). Notice of Appeal was filed on July 30, 1999. (R1-54).

On March 3, 2000 the Eleventh Circuit Court of Appeals affirmed the district court's judgment and on March 22, 2000 the appellant filed his Motion for Rehearing and Petition for Rehearing En Banc. It was denied on May 23, 2000.

Donald Mark Henson is presently serving his 63 month sentence at Talladega, Alabama with no possibility of parole or departure from his sentence under the "guidelines."

ARGUMENT

I. Fourth Amendment Violation.

The District Court in its finding of fact and conclusions of law failed to take into consideration the case of *United States v. Tovar-Rico*, 61 F.3d 1529 (11th Cir. 1995), where the consent to search was found invalid after

armed officers entered the residence, conducted a security sweep, and then obtained a consent to search. When the issue of voluntariness is raised on appeal, the Appellate Court is "to examine the entire record and make an independent determination of the ultimate issue of voluntariness," *Beckwith v. United States*, 425 U.S. 341, 348 (1976). The government has the burden of showing the consent was obtained and that it was freely and voluntarily given which is not met by a showing of mere submission to authority, *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983).

The trial court relied upon *United States v. Garcia*, 890 F.2d 355 (11th Cir. 1989) as well as other cases. Neither *Garcia* nor any of the other cases cited by Judge Propst involve any person who lacked the capacity to understand the consent which was obtained. The government depends entirely on a signed consent form which, though read to Ms. Henson, was most likely not understood or appreciated. Although the consent was read and signed, it might as well have been in Greek, because there is no evidence that the consent was understood or that Ms. Henson understood that she had the right to refuse.

The petitioner respectfully contends that the trial court's findings of fact should, of necessity, have resulted in a suppression of the evidence obtained in this warrantless search and that the Supreme Court should find that the authority of *Tovar-Rico*, dictated a reversal of the District Court's ruling on the Defendant's Motion to Suppress the Evidence.

II. Due Process Violation.

Donnie Henson has been sentenced to 63 months even though the trial judge believes that the sentence is "way out of line" (R9-8). Henson was not given an opportunity to show how he had changed his life since the predicate offense.

In *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079 (1949), Justice Black concluded that a sentencing judge should be in possession of the fullest amount of knowledge possible. In *Williams*, 337 U.S. at 247, 69 S. Ct. at 1083, he quoted with approval the following comments of Judge Lewis B. Schwellenback:

> The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in the federal court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified.

Id. at 249 n. 14, 69 S. Ct. at 1084 n. 14; *see also id.* at 248 n. 10, 69 S. Ct. at 1083 n. 10. Section 5H1 of the Guidelines specifically removes from the consideration of the sentencing judge many elements of "the life of a man, his background and his family," and this lack of information greatly inhibits the Court's ability to impose appropriate sentences.

In addressing whether defendants' due process rights have been violated, the Court must first determine whether defendants have a due process right during sentencing. If the answer is yes, then the Court must determine whether the Guidelines provide the process that is

due. *See Morrissey v. Brewer*, 408 U.S. 471, 481-90, 92 S. Ct. 2593, 2600-04, 33 L.Ed.2d 484 (1972).

The due process clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Procedural due process guarantees an individual an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Every defendant has a legitimate interest in the character of the procedure which leads to the imposition of his sentence. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Whether any procedural protections are due depends upon the extent to which an individual will be "condemned to suffer grievous loss." *Morrissey*, 408 U.S. at 481, 92 S. Ct. at 2600 (quoting *Joint AntiFascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)). The termination of a defendant's liberty by sentencing him to a term of incarceration unquestionably inflicts grievous loss upon the defendant.

Prior to *Mistretta*, a number of federal district courts held that the Guidelines as applied to defendants violated the due process clause. *United States v. Frauk*, 682 F. Supp. 815 (W.D. Pa. 1988), *United States v. Bolding*, 683 F. Supp. 1003 (D. Md. 1988), and *United States v. Lopez*, 684 F. Supp. 1506, 1512-14 (C.D. Cal. 1988) (en banc). After *Mistretta*, three circuits have addressed the due process issue and found no violation perhaps because of the mistaken interpretation that *Mistretta* somehow determined that the Sentencing Act of 1984 was not violative of the due process clause. In fact, *Mistretta* was decided exclusively

on arguments related to the separation of powers doctrine. This Court should carefully re-examine the due process issue in this case and render its opinion on the matter. If due process is afforded, Donnie Henson, your petitioner, respectfully contends that he will not receive the excessive sentence that has been imposed on him by the Commission and its guidelines.

III. The Sentencing Reform Act of 1984 violates Article III of the United States Constitution and the separation of powers doctrine.

The Defendant was sentenced to sixty-three months in prison pursuant to the Sentencing Reform Act of 1984. App. 24. The trial judge believed that this sentence was "way out of line." App. 23.

Article III of the Constitution of the United States reads: "Section 1. 'The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish . . . "

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Justice Samuel Miller, *Lectures on the Constitution of the United States*, at 314 (1893). "That judicial power . . . is the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction." *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

The Defendant's sentence was decided by the United States Sentencing Commission ("the Commission") created by Congress under Article III of the United States Constitution. The Commission is comprised of nine members. The voting members include at least three federal judges selected by the President and all members are appointed by the President with the advice and consent of the Senate and may be removed by the President for neglect of duty, malfeasance or any good cause. 28 U.S.C. § 991; Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat. 1937.

The framers of the Constitution assigned to each of the three distinct branches (the legislative, executive and judicial), distinct powers and responsibilities, devising a system of checks and balances to "diffuse power to better serve liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 870 (1952).

The Sentencing Reform Act of 1984 endows the Commission, under the power and control of the President with the judicial power of deciding the length and severity of criminal sentences for individual defendants. District Courts, and even appellate courts, cannot change a sentence as determined by the Commission. The courts' judicial powers in this regard have been eliminated and re-routed in violation of Article III.

This Honorable Court should reconsider and change its opinion rendered in *Mistretta v. U.S.*, 109 S. Ct. 647 (1989) because the Sentencing Act is clearly in violation of Article III of the constitution and our most precious separation of powers doctrine.

CONCLUSION

Donald Mark Henson was convicted as a felon in possession with evidence obtained in a warrantless search pursued because of a consent form which was signed even though District Judge Propst was "unable to determine whether she understood and appreciated what was read to her and what she signed." Voluntariness of consent cannot be established without an element of knowledge – ability which was lacking in this case. This case should have been reversed at the Eleventh Circuit.

Henson, whose predicate offense occurred in 1994, is serving a six year sentence which the trial judge found to be way out of line in this case because the sentencing guidelines imposed under the Sentencing Reform Act of 1984 deprived Henson of his right to due process by taking away the district court's functions and powers to determine just and fair sentence.

The Sentencing Reform Act of 1984 violated the powers of Article III Courts and by contradicting the separation of powers doctrine. This Court's opinion in *Mistretta* should be reconsidered in light of this and many other cases in which individuals have suffered from the rigid dictates of this misguided statute.

Dated this the 18 day of August, 2000.

Respectfully submitted,

ROBERT H. FORD
THE FORD LAW FIRM
1220 16th Street South
Birmingham, Alabama 35205
(205) 933-2070

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12607
Non-Argument Calendar

D. C. Docket No. 98-00360-CR-PT-NE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD MARK HENSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(March 3, 2000)

Before TJOFLAT and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Donald Mark Henson appeals his conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and his sentence of 63 months.

On appeal, Henson argues that his conviction should be reversed and his sentence should be vacated on the following grounds: (1) there is no valid consent given for

the search of his residence, and the evidence seized pursuant to that search should have been excluded at trial; (2) the trial court should not have admitted evidence that was not provided to him under Fed.R.Crim.P. 16, without allowing him a continuance to obtain and present evidence of vindictive prosecution; (3) the Sentencing Reform Act of 1984 violates Article III, Section I and the separation-of-powers provision of the Constitution; and (4) the sentencing guidelines violate the Fifth Amendment due process provision of the Constitution.

After review of the transcripts of the proceedings before the district court and other relevant portions of the record, and upon consideration of the parties' briefs, we find no reversible error.

Credibility is a matter for the fact finder. This record supports the facts determined by the trial judge after hearing the witnesses. There was no abuse of discretion in admitting into evidence the record of appellant's prior conviction. There is no merit in the arguments contending that the sentencing guidelines are unconstitutional.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
vs.	)	CR 98-PT-0360-NE
DONALD MARK HENSON	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 14, 1999)

This cause came on to be heard on defendant's Motion To Exclude [Suppress] evidence filed on March 18, 1999. The court conducted a hearing and finds as to the totality of circumstances:

In Favor Of Finding Of Consent

1. The two deputies did not tell Ms. Henson that they would arrest her and take her children if she did not consent to a search.

2. The police officers did not approach Ms. Henson with drawn weapons.

3. The deputy read the consent form to Ms. Henson.

4. Ms. Henson signed the consent form.

5. Ms. Henson was not in apparent distress other than what might be usual in the case of an arrest of her husband.

6. There was no affirmative coercion or duress imposed by the officers.

Factors Which Arguably Militate Against Finding Of Consent

1. Early morning hour.

2. Ms. Henson was awakened by the opening of the door and the arrest of her husband.

3. There were three officers in her residence when she signed the consent.

4. The court is unable to determine whether she understood and appreciated what was read to her and what she signed. This, of course, may be applicable in any such case and/or in related *Miranda* type warnings which are read.

5. Ms. Henson's husband had just been arrested and he had refused to consent to a search. This was not known to Ms. Henson.

6. There was the usual trauma of the arrest with the usual concomitant concern about small children.

The issue is close[d]. The court is, however, persuaded by the controlling authority of *U. S. v. Garcia*, 890 F.2d 355 (11th Cir. 1989) and *U. S. v. Long*, 866 F.2d 402 (11th Cir. 1989). *See also* other cases cited in *Garcia*. *See also Schneckloth v. U. S.*, 412 U.S. 218 (1973) and *U. S. v. Mendenhall*, 446 U.S. 544 (1980). *See also U. S. v. Butler*, 102 F.3d 1191 (11th Cir. 1997). The court has read *U. S. v. Washington*, 151 F.3d 1354 (11th Cir. 1998), but here the

consent form, which was read, told Ms. Henson of her right to refuse.

There is no dispute that Ms. Henson was a person who could give consent. The officers acted reasonably in assuming that the consent had been given.

This 14th day of April, 1999.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	**CR 98-PT-0360-NE**
DONALD MARK HENSON	)	

ORDER

(Filed Apr. 14, 1999)

In accordance with the Findings Of Fact And Conclusions Of Law filed contemporaneously herewith, defendant's Motion To Exclude [Suppress] filed on March 18, 1999, is **DENIED.**

DONE and **ORDERED** this 14th day of April, 1999.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

V. Case Number CR 98-PT-0360-NE

DONALD MARK HENSON
Defendant.

JUDGMENT IN A CRIMINAL CASE

(For Offense(s) Committed
On or After November 1, 1987)

(Filed July 23, 1999)

The defendant, DONALD MARK HENSON, was represented by Robert H. Ford.

The defendant was found guilty on count(s) 2 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s) involving the indicated offense(s):

Title & Section
18:922(g)(1)

Nature of Offense
Unlawful Transport of Firearms,
etc., Convicted Felon

Count Number(s)
2

As pronounced on July 21, 1999, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) 2, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 21st day of July, 1999.

/s/ Robert B. Propst
Senior United States Judge

Defendant's SSAN: 416-23-5096
Defendant's Date of Birth: 04/04/69
Defendant's address: 605 County Road 255;
Bridgeport, AL 35740

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY-THREE (63) MONTHS.

The defendant shall surrender to the United States Marshal for this district within ten (10) days, if he is not released on an appeal bond.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months. The Probation Office shall provide the defendant with a copy

of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime; specifically, the defendant shall not illegally possess a controlled substance and shall not own or possess a firearm or destructive device.

2) The defendant shall not leave the judicial district without the permission of the court or probation officer.

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

4) The defendant shall answer truthfully all inquiries by the probation officer, shall provide the probation officer access to requested financial information, and shall follow the instructions of the probation officer.

5) The defendant shall support his or her dependents and meet other family responsibilities.

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) The defendant shall notify the probation officer ten (10) days prior to any change in residence or employment. (On change of residence to a new jurisdiction of a person convicted either of a crime of violence or of a drug trafficking offense, the Probation Office is

responsible for complying with the notice provisions of 18 U.S.C. § 4042(b).)

8) The defendant shall refrain from excessive use of alcohol, except that a defendant while in the Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) shall consume no alcohol. The defendant shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

14) The defendant shall comply with any directions from the probation officer to serve notice of third party risks the defendant may pose, and shall cooperate with the officer's efforts to confirm compliance.

15) The defendant shall comply with the schedule of payments imposed by the probation officer to satisfy

the balance of any monetary obligation resulting from the sentence imposed in this case. Further, the defendant shall notify the probation office of any change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine, restitution, or assessment fee.

16) Unless excused by a special condition of supervised release in this Judgment or by a subsequent court order, the defendant shall comply with 18 U.S.C. § 3583(d) regarding mandatory drug testing. A positive urinalysis may result in the defendant's placement in the probation office's Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) at the direction of the probation officer.

17) The defendant may be placed in the probation office's Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) by virtue of a special condition of supervision contained in this Judgment, at the direction of the probation officer after a positive urinalysis, or a court order entered during the period of supervision for other good cause shown. This program may include (a) testing by the probation officer or an approved vendor to detect drug or alcohol abuse, (b) a mandatory drug education program (which may include individual or group counseling provided by the probation office or an approved vendor), (c) placement in a residential treatment program or community corrections center for up to 180 days at the direction of the probation officer (with the defendant to pay the cost of subsistence if the probation officer determines that the defendant has the ability to do so), and (d) home confinement subject to electronic monitoring for a maximum period of 90 days at the direction of the

probation officer (with the defendant to pay the cost of monitoring if the probation officer determines that the defendant has the ability to do so).

18) The defendant shall report in person, within 72 hours of release from the custody of the Bureau of Prisons, to the probation office in the district where the defendant is released.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall participate in the Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) conducted by the probation office (or a comparable program conducted in the district of supervision). (See the Standard Conditions for a brief description of possible terms of such participation.)

2) The defendant shall not incur any new debts (other than normal debts for utilities and rental expenses) or open any new lines of credit without permission of the probation officer unless the defendant is in compliance with the payment of any monetary obligations ordered.

FINE

The defendant shall pay a fine of $2000.00

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine is due and payable immediately and may be collected in accordance with the Bureau of Prisons Inmate Financial Responsibility Program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	22
Criminal History Category:	IV
Imprisonment Range:	63 months to 78 months
Supervised Release Range:	2 to 3 years
Fine Range:	$7,500 to $75,000
Restitution:	$ none

The fine is below the guideline range because of the defendant's inability to pay the minimum guideline fine.

The court finds that there is no victim of defendant's criminal conduct and consequently no restitution is ordered.

The Court finds no reason to depart from the sentence called for by application of the guidelines, inasmuch as the facts as found are the kind contemplated by the Sentencing Commission.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA	)	CR-98-PT-0360-NE
v.	)	
DONALD MARK HENSON	)	

INDICTMENT

(Filed Nov. 17, 1998)

***COUNT ONE:* (18 U.S.C. § 922(g)(9))**

The Grand Jury charges that:

On or about the 8th day of February, 1998, within the Northern District of Alabama, the defendant,

DONALD MARK HENSON

having been convicted on January 31, 1992, in the Circuit Court of Jackson County, Alabama, of a misdemeanor crime of domestic violence in case number 91-2248, did knowingly possess firearms and ammunition, that is,

1) One **RUGER MODEL P94DC, .40 CALIBER PISTOL** serial number 34047372;

2) One **WINCHESTER MODEL 1300 DEFENDER,** 12 gauge pump shotgun, serial number L2988439;

4) One **COLT AR-15 MODEL SPI .223 CALIBER RIFLE,** serial number 07464;

5) One **BROWNING MODEL 2000, 20 GAUGE SEMI-AUTOMATIC SHOTGUN,** serial number 07464;

6) One **REMINGTON MODEL 581 .22 CALIBER RIFLE;** all of which had been shipped and transported in interstate commerce in violation of title 18, United States code, Section 922(g).

A TRUE BILL

/s/ [Illegible]
FOREMAN OF THE GRAND JURY

G. DOUGLAS JONES
United States Attorney

/s/ Deirdra J. Brown
DEIRDRA J. BROWN
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA	)	**CR-98-PT-0360-NE**
	)	
v.	)	
	)	
DONALD MARK HENSON	)	

SUPERCEDING INDICTMENT

(Filed Febr. 26, 1999)

COUNT ONE: **(18 U.S.C. § 922(g)(9))**

The Grand Jury charges that:

On or about the 8th day of February, 1998, within the Northern District of Alabama, the defendant,

DONALD MARK HENSON

having been convicted on January 31, 1992, in the Circuit Court of Jackson County, Alabama, of a misdemeanor crime of domestic violence in case number 91-2248, did knowingly possess firearms and ammunition, that is,

1) One **RUGER MODEL P94DC, .40 CALIBER PISTOL** serial number 34047372;

2) One **WINCHESTER MODEL 1300 DEFENDER,** 12 gauge pump shotgun, serial number L2988439;

4) One **COLT AR-15 MODEL SPI .223 CALIBER RIFLE,** serial number SP202663;

5) One **BROWNING MODEL 2000, 20 GAUGE SEMI-AUTOMATIC SHOTGUN,** serial number 07464;

6) One **REMINGTON MODEL 581 .22 CALIBER RIFLE;** all of which had been shipped and transported in interstate commerce in violation of title 18, United States code, Section 922(g)(9).

COUNT TWO: **(18 U.S.C. § 922(g)(1))**

The Grand Jury charges that:

On or about the 8th day of February, 1998, within the Northern District of Alabama, the defendant,

DONALD MARK HENSON

having been convicted on February 24, 1994, in the Circuit Court of Jackson County, Alabama, of a felony, to wit: receiving stolen property, in case number CC 93-593, did knowingly possess firearms and ammunition, that is,

1) One **RUGER MODEL P94DC, .40 CALIBER PISTOL** serial number 34047372;

2) One **WINCHESTER MODEL 1300 DEFENDER,** 12 gauge pump shotgun, serial number L2988439;

4) One **COLT AR-15 MODEL SPI .223 CALIBER RIFLE,** serial number SP202663;

5) One **BROWNING MODEL 2000, 20 GAUGE SEMI-AUTOMATIC SHOTGUN,** serial number 07464;

6) One **REMINGTON MODEL 581 .22 CALIBER RIFLE;**

all of which had been shipped and transported in interstate commerce in violation of title 18, United States code, Section 922(g)(1).

A TRUE BILL

/s/ [Illegible]
FOREMAN OF THE GRAND JURY

G. DOUGLAS JONES
United States Attorney

/s/ Deirdra J. Brown
DEIRDRA J. BROWN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA Plaintiff v. DONALD MARK HENSON Defendant	)	CASE NUMBER: CR 98-PT-0360-NE

CLERK'S COURT MINUTES

(Filed July 23, 1999)

This action came on for trial on April 15, 1999, before the Court and a jury, the Honorable Robert B. Propst, Senior United States District Judge, presiding.

At the conclusion of government's testimony, defendant Donald Mark Henson made an oral motion for Judgment of Acquittal, which the court GRANTED as to Count One and DENIED as to Count Two. Pursuant to the court's ruling, it is ORDERED and ADJUDGED that Count One of the Indictment be DISMISSED.

DATED: April 19, 1999

BIRMINGHAM, Alabama

COURT REPORTER: Teresa Roberson

PERRY D. MATHIS, CLERK

By: /s/ Robert L. Duncan, Jr.
Deputy Clerk

[SEAL]

TRUE COPY:

By: /s/ K. Clark

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12607-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellees

versus

DONALD MARK HENSON,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed May 23, 2000)

BEFORE: TJOFLAT and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
SENIOR CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	*	Case No. CR-98-P-360-NE
v.	*	Birmingham, Alabama
DONALD MARK HENSON,	*	July 21, 1999 8:30 a.m.
Defendant.	*	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE.

* * *

[8] is no basis for downward departure.

MR. FORD: I realize that, Your Honor.

THE COURT: I think sixty-three months is way out of line. But that is my sense. And it used to be the judges could have some sense.

MR. FORD: This particular case, it's going to destroy a man's life and his family.

THE COURT: It used to be that the judges could have some sense. Our sense has been taken away from us in that regard.

MR. FORD: It is irrational.

THE COURT: That's where we are.

MR. FORD: We intend to bring that point up on appeal.

THE COURT: I may be doing you a favor by saying that I find that there is no basis for downward departure.

Mr. Ford, do either you or Mr. Henson either one have anything else you wish to say before the Court imposes a sentence insofar as it may relate to any sentence that the Court may impose within range or otherwise?

MR. FORD: No, sir.

THE COURT: Mr. Henson, do you have anything you wish to say, sir?

THE DEFENDANT: No, sir.

THE COURT: Government?

[9] MS. BROWN: No, Your Honor.

THE COURT: All right. The Court finds no reason to depart from the sentence called for by the application of the guidelines in as much as the facts as found are the kind contemplated by the sentencing commission.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Donald Mark Henson, is hereby committed to the custody of the bureau of prisons to be imprisoned for a term of sixty-three months.

I am not ordering a fine because of the defendant's inability to pay and because of his family and dependent situation.

It is ordered that the defendant pay the United States a special assessment fee of one hundred dollars. The fine and special assessment are due immediately and may be collected in accordance with the bureau of prison inmate financial responsibility program.

There may be, Mr. Ford, there may be some basis for the Court ordering a fine not because I think one is appropriate under the circumstances, but the bureau of prisons apparently in making a determination as to whether someone can work while in a prison setting makes a determination based on whether they owe some money or not. And in some instances, it's been suggested to me that it's

* * *

Supreme Court, U.S.
FILED
OCT 13 2000
CLERK

(2)

No. 00-409

In The
Supreme Court of the United States

LEVON HOPKINS,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

WINSTON E. MILLER
Counsel of Record
TONY C. COLEMAN
JULIE C. FOSTER
BROWN, TODD & HEYBURN PLLC
400 WEST MARKET, 32ND FLOOR
LOUISVILLE, KY 40202-3363
(502) 589-5400
(502) 581-1087 FAX

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(b) of the Rules of the Supreme Court of the United States, Respondent United Parcel Service, Inc. respectfully submits this Corporate Disclosure Statement.

United Parcel Service, Inc., Respondent, is an Ohio corporation which is a wholly-owned indirect subsidiary of United Parcel Service, Inc., a Delaware corporation. United Parcel Service, Inc., a Delaware corporation, is a publicly held corporation.

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JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for a writ of certiorari "only for compelling reasons." According to Rule 10, subparagraphs (b) and (c), "compelling reasons" include if a state court of last resort (1) decides an important federal question in a way that conflicts with decisions of courts of appeal or another state court of last resort; (2) decides an important federal question that conflicts with relevant decisions of this Court; or (3) decides "an important federal question that has not been, but should be, settled by this Court . . . ."

Petitioner has not and cannot set forth compelling reasons to justify the exercise of this Court's discretionary jurisdiction. First, the decision of the Ohio First District Court of Appeals ("Court of Appeals") leading to this petition is unpublished and therefore is not binding beyond this current action. See, Rule 2, Ohio Supreme Court rules for the Reporting of Opinions. Second, the Court of Appeals' decision does not conflict in any way with federal law. The petition should therefore be denied.

STATEMENT OF THE CASE

On May 3, 1996, Petitioner was discharged from his position as a "Feeder Driver" for United Parcel Service, Inc. ("UPS") for having three avoidable accidents within five months while driving a 68,000 pound UPS tractor trailer full of packages along public roadways from one UPS facility to another.

Pursuant to the terms of the Collective Bargaining Agreement ("Agreement") between Petitioner's union, the International Brotherhood of Teamsters, Local 100 ("Union") and UPS, Mr. Hopkins protested his discharge and filed a grievance with his Union. Under the terms of the Agreement, UPS and Union representatives met in an attempt to resolve the matter at the local level. The local grievance panel was unable to reach a consensus on Petitioner's grievance so the matter was sent before the Ohio Joint State Committee ("OJSC"). Mr. Hopkins' grievance "protesting his unfair discharge" was heard by the OJSC arbitration panel on May 13, 1996. At the hearing, the Union presented its case on behalf of Petitioner. Petitioner was given the opportunity to explain his position to the panel. It is undisputed that the Union and Mr. Hopkins decided not to raise any race discrimination claim at the hearing. The OJSC panel, comprised equally of Union and UPS representatives, reached a consensus. It upheld Petitioner's discharge for just cause. Pursuant to the terms of the Agreement, the decision of the OJSC panel was final and binding upon the parties.

On January 30, 1998, Mr. Hopkins filed a Complaint in U.S. District Court for the Southern District of Ohio ("District Court"), alleging that he had been discharged because of his race in violation of federal and state law. On January 19, 1999, the District Court granted UPS's motion for summary judgment on the federal claim on the grounds

that the claim was untimely and dismissed the state law claim without prejudice.[1] Mr. Hopkins then filed a lawsuit in the Hamilton County Court of Common Pleas ("Trial Court") instituting the current action.

The Trial Court granted UPS's Motion for Summary Judgment. One of the reasons for this holding was the fact that Mr. Hopkins' discharge had been found to be for just cause in his arbitration, which barred a civil action under ORC § 4112.14(C). Significantly, Mr. Hopkins did not raise either of the questions presented to this Court in the Trial Court.

The Court of Appeals for the First Appellate District of Ohio ("Court of Appeals") affirmed the Trial Court's decision, holding that the language of ORC § 4112.14(C) applies to discharge claims in which race discrimination is alleged. As was the case in the Trial Court, Petitioner failed to raise the issues presented in this Court to the Court of Appeals.

On June 14, 2000, the Ohio Supreme Court summarily rejected Petitioner's request to accept jurisdiction in this case, dismissing the appeal "as not involving any substantial constitutional question." In his Memorandum in Support of Jurisdiction before the Ohio Supreme Court, Petitioner argued for the first time that UPS's interpretation of Ohio Revised Code § 4112.14(C) should be rejected because such an interpretation would violate Federal law.

---

[1] In an unpublished opinion, the Sixth Circuit Court of Appeals affirmed the District Court's dismissal of Hopkins' Title VII claim on the basis that it had not been timely filed. Hopkins v. United Parcel Service, 221 F.3d 1334, 2000 WL 923458 (6th Cir. (Ohio) 2000).

ARGUMENT

I. HOPKINS FORFEITED THE ARGUMENTS RAISED IN THIS COURT BY FAILING TO RAISE THEM IN EITHER THE TRIAL COURT OR THE COURT OF APPEALS.

The only pertinent issue in this case which was raised before or considered by either the Trial Court or the Ohio Court of Appeals was whether Ohio Revised Code ("ORC") § 4112.14, on its face, barred Petitioner's state law race discrimination claim. As an afterthought, Petitioner first raised the current issues in his Memorandum in Support of Jurisdiction before the Ohio Supreme Court.

Absent exceptional circumstances, black letter law dictates that a party forfeits an argument by failing to raise it at the trial court level. See, e.g., Hormel v. Helvering, 312 U.S. 552, 556 (1941). The concurrence in Freytag v. Commissioner, 501 U.S. 868 (1991), provides a clear rationale for forfeiture principles:

> These rules reflect the principle that a trial on the merits . . . is the "main event," and not simply a "tryout on the road" to appellate review. The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance.

Id. at 895 (citations omitted).

This rationale is particularly persuasive here, where the case was decided as a matter of law via summary judgment. As the Tenth Circuit Court of Appeals stated in Tele-Communications, Inc. v. C.I.R., 104 F.3d 1229 (10th

Cir. 1997),

> This rule is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories . . . . In order to preserve the integrity of the appellate structure, we should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to "give it everything they've got" at the trial level.

Id. at 1232-33.

Petitioner has no excuse for not having raised the arguments presented here before the Trial Court or Court of Appeals. The Petition for Writ of Certiorari should be denied for this reason alone.

II. FEDERAL LAW DOES NOT PRE-EMPT ORC § 4112.14(C).

Pre-emption of state law by federal law "is not to be lightly presumed," and may only occur under three scenarios. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987). First, Congress may pre-empt state law by so stating expressly. Id. at 280. Second, Congress may pre-empt inferentially, where a scheme of federal regulation demonstrates that Congress left no room for state regulation. Id. at 281. Because Congress never expressly or inferentially declared an intent to pre-empt state employment discrimination law, neither of these arguments applies here.

State law may also be pre-empted by federal law "to the extent it conflicts with federal law." Id. at 281. Petitioner argues that ORC § 4112.14(C) should be pre-empted on this basis. He is wrong.

Certainly, ORC § 4112.14(C) is not pre-empted by Title VII. In the two sections of the 1964 Civil Rights Act set forth below, Congress stated that state anti-discrimination laws will only be pre-empted if the statutes require action which violates Title VII:

> Nothing in this title shall be deemed to exempt or relieve any person from any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7 (emphasis added);

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (emphasis added). See also, California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 281 (1987) (plurality opinion); Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir.), *cert. denied* 522 U.S. 963 (1997).

The Ohio statute at issue here in no way requires or encourages discrimination in contravention of Title VII. Instead, the statute only limits state remedies, precluding discharged employees to whom arbitration is available from bringing claims for discriminatory discharge under a state statute.

None of the cases cited in Section I of the Petition is relevant to this case. None of the cases discusses or analyzes pre-emption of a state civil rights statute by federal law. More specifically, none of the cases analyzes preemption of a state civil rights statute which on its face limits access to courts. Instead, the cases hold that the existence of a grievance and arbitration provision in a collective bargaining agreement cannot, without a clear and express waiver, preclude an employee from bringing discrimination claims. Neither the Trial Court nor the Court of Appeals held that the arbitration provision in the applicable Collective Bargaining Agreement bars Petitioner's claim. Rather, the lower courts held that a state civil rights statute, ORC § 4112.14(C), bars his claims. This critical distinction defeats Petitioner's argument.

III. ORC § 4112.14(C) IS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT BECAUSE IT MAKES NO DISTINCTION BETWEEN UNION AND NON-UNION EMPLOYEES.

Petitioner exaggerates both the impact of the Court of Appeals' decision in this case and the scope of its holding. First, as set forth above, the decision does not impact "tens of thousands of other unionized workers in Ohio," because it is unpublished and therefore only binding between Petitioner and UPS. Therefore, this decision will not chill union activity,

and it has no far-reaching impact. More importantly, the Court of Appeals' construction of ORC § 4112.14(C) does not penalize employees choosing to unionize.

In contrast to this case, all of the precedent cited in Section II of the Petition analyzes state laws which on their face penalized only unionized employees. The Wisconsin statute at issue in Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951), was struck down because it prohibited post-impasse strikes by certain unionized employees, in direct contravention of the National Labor Relations Act. Likewise, the statute struck down in Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), penalized unionized employees for filing unfair labor practice charges by prohibiting collection of unemployment benefits. The policy struck down in Livadas v. Bradshaw, 512 U.S. 107 (1994), non-enforcement of a California wage law if employees and employers were covered by a collective bargaining agreement containing an arbitration clause, also treated employees choosing to unionize less favorably than those not unionized.

In Livadas, this Court distinguished the policy before it -- a policy that on its face distinguished between union and non-union employees -- from the statute at issue in Ft. Halifax Packing v. Coyne, 482 U.S. 1 (1987). In Ft. Halifax Packing, this Court held that a Maine statute allowing employees and employers to contract for plant-closing severance payments other than those mandated by state law was not pre-empted by federal law. As this Court stated in Livadas,

> Most fundamentally the Maine law [was not pre-empted because it] treated all employees equally whether or not represented by a labor

> organization. All were entitled to the statutory severance benefit, and all were allowed to negotiate agreements providing for different benefits.

Livadas, 512 U.S. at 131 (emphasis added).

The statute at issue here is remarkably similar to the statute at issue in Ft. Halifax Packing. Both statutes allow employers and employees to maintain agreements which result in the unavailability of state statutory rights. Unlike the policy at issue in Livadas, ORC § 4112.14(C) does not make a distinction based on union status. In accordance with Ft. Halifax Packing, ORC § 4112.14(C) is not pre-empted.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied. First, Mr. Hopkins waived the arguments in his Petition by failing to raise them in either the Trial Court or the Court of Appeals. Furthermore, ORC § 4112.14(C) is not pre-empted because it neither conflicts with federal law nor penalizes unionized employees. The Petition fails either to demonstrate any conflict in decisions or to raise any important federal question that has not already been settled by this Court.

BROWN, TODD & HEYBURN PLLC

/s/_____
Winston E. Miller
Tony C. Coleman
Julie C. Foster
400 West Market, 32nd Floor
Louisville, Kentucky 40202-3363
(502) 589-5400/(502) 581-1087 (fax)

Attorneys for United Parcel Service, Inc.